No. 80357-9 (Consolidated with No. 80366-8)

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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RAJVIR PANAG, on behalf of herself and all others similarly situated,

Respondent,

v.

FARMERS INSURANCE COMPANY, a domestic insurance company, and CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,

Petitioners.

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MICHAEL STEPHENS, on behalf of himself and all others similarly situated,

Respondent,

v.

OMNI INSURANCE COMPANY, a foreign insurance company,

Defendant/Appellant,

and

CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,

Petitioner.

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# SUPPLEMENTAL BRIEF OF PETITIONER CREDIT CONTROL SERVICES, INC.

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## I. INTRODUCTION

Petitioner Credit Control Services, Inc. ("CCS") urges this Court to confirm that the Consumer Protection Act ("CPA") does not apply to disputes between adversaries such as tort claimants and alleged tortfeasors. In this case, two uninsured motorists who were involved in automobile accidents received subrogation letters that requested reimbursement of sums paid by injured parties' insurance companies. The letter recipients sued the insurance companies and their agent under the CPA. This Court accepted review to address whether receipt of a subrogation demand letter creates standing to bring a CPA claim. In accordance with established Washington law and sound public policy, CCS respectfully requests that this Court decline to apply the CPA to disputes of this nature.

## II. ASSIGNMENT OF ERROR

CCS assigns error to the Court of Appeals' decision in *Stephens v. Omni*, 138 Wn. App. 151, 167, 159 P.3d 10 (2007), which concludes that the "practice of sending" subrogation letters to uninsured motorists who allegedly caused injury and damage in automobile accidents violates the CPA as a matter of law.[1]

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[1] CCS expressly incorporates herein the assignments of error it set forth in previous briefing submitted to this Court and to the Court of Appeals, as well as those assignments of error set forth by Petitioner Farmers Insurance Company.

## III. STATEMENT OF THE CASE

### A. Payments Made and Recovery Efforts.

While driving without liability insurance, Plaintiffs/Respondents Rajvir Panag and Michael Stephens were involved in automobile accidents that resulted in bodily injury and property damage. CP(P)[2] 681-82; CP(S)[3] 68, 198.[4] The insurers of the other parties involved in those accidents provided compensation to their policyholders and, after doing so, pursued recovery from the allegedly responsible parties on behalf of the injured victims. CP(P) 485-86; CP(S) 198-99. The insurers then hired Petitioner Credit Control Services, Inc. ("CCS"), a collection services company, to assist in those efforts. CP(P) 486, 494-96; CP(S) 198-99.

CCS sent letters to Ms. Panag and Mr. Stephens that requested information regarding the respective insurance coverage or reimbursement for sums paid by the insurers. CP(P) 454-61; CP(S) 388-90. The letters referenced "subrogation claim" and specified an "amount due" based upon calculations by licensed insurance adjusters prior to CCS's involvement. CP(P) 454-61, 596-97; CP(S) 388-90. Upon receipt of these letters, Ms.

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[2] The Clerk's Papers in *Panag v. Farmers*, are cited as CP(P) __.

[3] The Clerk's Papers in *Stephens v. Omni*, are cited as CP(S) __.

[4] Mr. Stephens held himself out to be uninsured until after the letters at issue were sent, at which time he revealed that he actually had liability insurance. CP(S) 68, 192-96, 386. For purposes of this brief, and in particular the standing argument, there is no material difference between the relative positions of the two Plaintiffs/Respondents, and so both will be referenced as "uninsured."

Panag and Mr. Stephens 1) knew the letters were in reference to their respective automobile accidents, 2) believed they owed no money, and 3) made no payment to CCS or the insurers.[5] CP(P) 87-88; CP(S) 68, 385-87.

## B. The Lawsuits, the Court of Appeals Opinion, and This Court's Review.

Ms. Panag sued CCS and its client, Farmers Insurance Company (also a Petitioner in this case). CP(P) 1-13. Mr. Stephens, who is represented by the same attorneys, also sued CCS and its client, Omni Insurance Company, in a separate lawsuit. CP(S) 5-17. Each Complaint alleged, *inter alia*, violations of the CPA (RCW 19.86.020) on behalf of a putative classes that had no other members and was not certified. CP(P) 1-13; CP(S) 5-17. Although neither was actually deceived, both Ms. Panag and Mr. Stephens sought treble damages and attorney fees under the CPA based upon the allegation that the language in the letters had a capacity to deceive. CP(P) 1-13; CP(S) 5-17.

In a published opinion, the Court of Appeals confirmed that it is not deceptive for "a tort claimant or the claimant's agent to correspond with an alleged tortfeasor and demand payment of a specific sum"[6] and, further, affirmed the right of insurance companies to recover subrogation

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[5] Mr. Stephens' own insurance company promptly paid the sum following an independent assessment. CP(S) 192-96, 386.

[6] *Stephens v. Omni*, 138 Wn. App. 151, 167, 159 P.3d 10 (2007).

interests and employ collection service companies to do so.[7] Even so, the Court of Appeals concluded that Ms. Panag and Mr. Stephens had established the elements required to prove CPA violations without having first determined if they had standing to bring such claims.[8]

This Court granted review to address whether the CPA applies at all under these circumstances. This Court framed the issue as follows: "Whether uninsured and underinsured motorists who were involved in accidents had standing to bring Consumer Protection Act claims against insurance companies and their collection agency in connection with the companies' efforts to collect on subrogation claims against the motorists."[9]

## IV. ARGUMENT

### A. Threshold Issue: Whether the CPA Applies At All.

Prior to determining whether a defendant's conduct has violated the CPA, courts must first undertake a "gate-keeper" analysis to determine whether the nature of the plaintiff's claims gives rise to a CPA cause of action. Washington courts have intermittently used the term "standing" to describe this initial analysis of whether the CPA applies. Whether discussed in terms of "standing to sue" or simply CPA "applicability," the

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[7] *Id.* at 171.

[8] *Id.* at 158.

[9] This statement of the issue appears on this Court's website at http://www.courts.wa.gov (Supreme Court Issues, May Term 2008).

threshold issue relates to whether certain types of underlying events and transactions fall within the purview of the CPA. *See Holiday Resorts Cmty. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 219-22, 135 P.3d 499 (2006) (addressing first whether circumstances gave rise to "standing to sue . . . under the CPA"), *review denied*, 160 Wn.2d 1019 (2007); *see also Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 311, 858 P.2d 1054 (1993) (addressing whether a plaintiff "has standing to sue" under circumstances presented); *Eriks v. Denver*, 118 Wn.2d 451, 463, 824 P.2d 1207 (1992) ("We must first determine whether the CPA applies at all on the facts of the case.").

Ms. Panag defends the underlying Court of Appeals decision by stating that it "closely and faithfully follows the thorough analytical framework that this Court set out in *Hangman Ridge* [*Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986)]."[10] The fundamental problem with this approach is that it overlooks the threshold issue of whether the conduct at issue falls within the scope of the CPA in the first place. By narrowly focusing on the *Hangman Ridge* five-part analysis that dictates whether a party can prevail under the CPA, the Court of Appeals failed to address whether uninsured motorists who receive subrogation demand letters have standing to bring CPA claims against tort

[10] *See* Respondent Panag's Answer to Petitions for Discretionary Review, at 3.

claimants at all. Washington law, analogous federal law, and sound public policy confirm that this type of adversarial dispute is not, and should not be, subject to the CPA.

## B. A Bright-Line Test of Applicability: The CPA Does Not Apply to Adversarial Tort Disputes.

### 1. The Types of Actions Listed in the CPA Statute Differ Dramatically From Adversarial Tort Disputes.

The CPA is a coveted statutory scheme that allows recovery based upon generalized proof (*e.g.*, the mere capacity to deceive as opposed to actual deception), and also permits the trebling of damages and recovery of attorney fees. *See* Ch. 19.86 RCW; *Hangman Ridge*, 105 Wn.2d at 784-93 (listing five elements required to prevail in a private CPA action). The CPA, by its own terms, applies only to certain types of underlying conduct. *See* RCW 19.86.090 (listing business practices that fall within the CPA's protections[11]). The types of transactions subject to the CPA typically involve consenting parties with reasonable expectations that their business-related course of dealings will be protected. As an illustration of the type of protective relationship required, this Court observed that the duty of good faith in handling a claim against an insured "springs from a

[11] Prohibited acts set forth in the CPA statute unrelated to this case are unfair methods of competition (RCW 19.86.020), restraining trade or commerce in contracts or conspiracies (RCW 19.86.030), monopolizing any part of trade or commerce (RCW 19.86.040), price fixing (RCW 19.86.050), and acquiring stock to substantially lessen competition (RCW 19.86.060).

fiduciary relationship that is entirely lacking between the person injured and the insurance company." *Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960).

The CPA is concerned with unreasonable practices that have the potential to harm the development and preservation of business. Indeed, the wording of RCW 19.86.920 provides a safe harbor for practices that are "reasonable in relation to the development and preservation of business" and "not injurious to the public interest." Actions that sound in tort, by contrast, are adversarial from the outset and focused on redressing injuries. *See generally Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007). Such adversarial disputes lack the reasonable expectation of business protection inherent in those disputes covered by the CPA. It is therefore not surprising that there is no statutory provision that brings tort disputes, such as automobile accidents, within the bounds of the CPA.

It is logical and feasible to draw a bright-line rule that distinguishes consumers and consensual parties in actual or would-be business relationships from tort adversaries. The former group entered into (or, perhaps, attempted to enter into) consensual relationships based upon some type of business dealing.[12] By contrast, the latter group has no

[12] Washington courts have expansively applied the CPA to would-be, actual, direct, and indirect consumer transactions. *See, e.g., Washington State Physicians Insurance Exchange & Assn. v. Fisons*, 122 Wn.2d 299, 313, 858 P.2d 1054 (1993); *Holiday*

consensual business relationship whatsoever, having only interacted through a tort-based incident such as an automobile accident. While the former group may be reasonably expected to protect one another, the latter group, as adversaries, most certainly would not. Indeed, the opposite is true. The party alleged to be at fault in an automobile accident knows to expect an aggressive claim over both fault and damages, which claim may need to be vigorously contested. Therefore, consistent with the statutory scheme set forth in Chapter 19.86, the CPA should apply to business transactions between parties and should not apply at all in the fundamentally dissimilar context of adversarial tort disputes.

In this case, CCS attempted – on behalf of insurers that were acting, in turn, on behalf of their insured drivers – to recover subrogation claims based upon the insurers' payments to injured parties arising out of automobile accidents. By doing so, the insurers and CCS did not in any way alter the nature of the underlying relationship, *i.e.*, an adversarial tort. *See, e.g., Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (explaining that the subrogating insurer "steps 'into the shoes'" of its insured). CCS's business relationship with the insurers does not in any way change the nature of CCS's adversarial subrogated

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*Resorts Cmty. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 219-22, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007); *State Farm Fire and Casualty Co. v. Huynh*, 92 Wn. App. 454, 459, 962 P.2d 854 (1998). Even so, each of these cases involves a consensual business-related transaction.

relationships with Ms. Panag and Mr. Stephens, respectively.[13] As there was no consensual relationship that would give rise to reasonable expectations between these adversaries, the CPA should not apply.

### 2. Published Decisions Confirm That the CPA Does Not Apply To Adversarial Tort Disputes.

Published Court of Appeals decisions dating back to 1979 have expressly refused to apply the CPA to disputes that originated between tort adversaries. In *Marsh v. General Adjustment Bureau*, 22 Wn. App. 933, 937, 592 P.2d. 676 (1979), the Court of Appeals held that the CPA did not apply to a claim by a plaintiff injured in a fall down a college building stairway brought against an independent adjuster for the insurer. The injured plaintiff alleged that the adjuster misled the accident victim, causing her to miss the statute of limitations on her personal injury claim. In the words of the Court of Appeals:

> When the insurance company dealt with Mrs. Marsh, through its adjuster, it stood in the shoes of its insured, Whitman College. Thus, its relationship with Mrs. Marsh was adversarial in nature. In these circumstances, the Consumer Protection Act is not applicable.

*Id.* CCS, acting as a collection services company for a subrogating insurer in two automobile accident cases, is in the same adverse relationship with

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[13] *See Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1371 (11th Cir. 1998) (under similar facts, observing that the subrogation specialist's business relationship with the insurer does not change the fact that no business or consensual arrangement existed between the claimant and the damaged party, its insurer or the subrogation specialist).

Ms. Panag and Mr. Stephens. Thus, under *Marsh*, subrogation letter recipients do not have standing to bring CPA claims.

In *Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869 (1981), at issue was an automobile accident subrogation case factually similar to this case. The Court of Appeals followed the reasoning in *Marsh* in deciding that a third party making claims for automobile accident injuries against an insurer has no right to assert a CPA claim. *Green* held:

> A Consumer Protection Act claim against an insurance company for breach of its duty to exercise good faith under RCW 48.01.030 is limited to the insured. *Rice v. Life Ins. Co.*, 25 Wn. App. 479, 609 P.2d 1387 (1980). Here, Federated is Holm's insurer, not the appellants'. They cannot assert a claim under the Act because it does not apply to a relationship that is adversarial in nature.

*Id.* (citing *Marsh*, 22 Wn. App. at 937);[14] *see also Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004) (addressing an attorney's solicitation of new clients, and concluding that "a CPA cause of action does not lie under these facts"); *Demopolis v. Peoples Nat'l Bank*, 59 Wn. App. 105, 119, 796 P.2d 426 (1990) (holding that the CPA does not apply to adversarial claims asserted by a plaintiff against his opponent's

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[14] Certain relationships that meet a "public interest test" can form the basis for a CPA violation. *See Escalante v. Sentry Insurance,* 49 Wn. App 375, 743 P.2d 832 (1987), *disapproved on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003), criticizes *Marsh*'s application of a consumer test. *Id.* at 386-87. The *Escalante* decision does not, however, address the adverse relationship test for applicability and fails to distinguish the *Green*, 28 Wn. App. 135, decision that immediately followed *Marsh*.

attorney). Neither Ms. Panag nor Mr. Stephens were insured by Farmers or Omni (for which CCS is subrogating). Rather, they are alleged tortfeasors, adverse to tort claimants. Thus, under *Green*, neither Ms. Panag nor Mr. Stephens has the right to bring a CPA claim against the subrogating insurers or their agent in this context.

Moreover, in *Stevens v. Hyde Athletic Industries*, 54 Wn. App. 366, 369-70, 773 P.2d 871 (1989), the Court of Appeals confirmed that actions for personal injuries do not fall within the purview of the CPA. Of significance to the *Stevens* Court was the fact that the gravamen of the action was a claim, in tort, for personal injuries (from injuries allegedly due to poorly designed baseball cleats), as opposed to a transaction relating to business interests. Following *Stevens*, the gravamen in this case is the underlying automobile accident claims for property damage and injuries, not a claim for business interests. As such, the claims brought by tort adversaries are similarly outside the scope of the CPA.

In addition, an analogous case from the U.S. Court of Appeals for the Eleventh Circuit supports the analysis and conclusions reached in these cases.[15] *Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1371 (11th Cir. 1998). Addressing the practice of sending subrogation demand letters sent

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[15] Notably, the CPA contains its own legislative directive to construe its provisions consistently with "federal statutes dealing with the same or similar matters." RCW 19.86.920 (emphasis added).

to alleged tortfeasors, the Eleventh Circuit examined a similar question of applicability under The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA"). The *Hawthorne* court undertook a "gate-keeping" analysis in determining that the statute did not apply because the alleged obligation arose from a tort. *Id.* In doing so, the Eleventh Circuit highlighted the difference between contractual arrangements based upon some type of consensual business dealing between parties, as contrasted with subrogation demand letters between tort adversaries:

> Because Hawthorne's alleged obligation to pay Mac Adjustment for damages out of an accident does not arise out of any consensual or business dealing, plainly it does not constitute a transaction under the FDCPA.

*Id.*

In this case, Ms. Panag and Mr. Stephens were alleged to have caused automobile accidents. The opposing drivers' insurers paid each claim and commenced subrogation recovery procedures with the assistance of CCS. Just as was the case in *Marsh*, by presenting the insurers' subrogated claim, CCS was simply an adverse party disputing a tort claim with the opposing drivers. Here, Ms. Panag and Mr. Stephens have complained about representations that occurred in the course of the resolution of that automobile accident dispute and seek financial compensation from CCS. Like the claimants in *Green*, Ms. Panag and Mr.

Stephens are third parties with no relationship with the subrogating insurers or their collection services company CCS. Ms. Panag and Mr. Stephens argue as adversaries, not as consumers or quasi-consumers with any reasonable expectation of protection from CCS arising out of any consensual business relationship. In the words of the *Green* Court, "the CPA simply does not apply to a relationship that is adversarial in nature." *Green,* 28 Wn. App. at 137.[16]

### C. Public Policy Does Not Support Application of the CPA to Adversarial Tort Disputes.

#### 1. Remedies Already Exist to Compensate Letter Recipients Who Suffer Injury and To Punish Overreaching Tort Claimants.

CCS is not asking this Court to specially exempt from liability drafters of subrogation demand letters. If the content of such a letter is over-reaching and the letter recipient is injured, remedies are available outside of the CPA. There are numerous potential causes of action available to an allegedly aggrieved recipient of a subrogation recovery letter. Arguably deceptive activities are already subject to legal action

[16] It is noteworthy that the relationship necessary to trigger potential application of the CPA in this context could exist if it were the insured drivers who were complaining about their insurers' subrogation practices (if, hypothetically, some improper practice deprived the insured driver of his or her proper portion of funds collected). Under such circumstances, the insured drivers (who are in consumer relationships with their insurers, respectively) would have a reasonable expectation of protective business conduct by virtue of that relationship.

under the torts of negligent misrepresentation[17] and/or intentional misrepresentation/fraud.[18] Truly egregious conduct could even give rise to the tort of outrage. *See Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 86-87, 604 P.2d 1025 (1979). All of the causes of action are subject to class action treatment if the requisite requirements of Civil Rule 23 can be met. Indeed, stripped of their CPA verbiage, the existing claims asserted by Ms. Panag and Mr. Stephens are for negligent, if not intentional, misrepresentation.[19] What they do not support, however, is a claim under the CPA.

**2. Extension of the CPA to Tort Based Claims Would Curtail Resolution of Tort Disputes.**

If this Court were to determine that an uninsured motorists' receipt of a subrogation demand letter creates standing to bring a CPA claim, then

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[17] *See Elliott Bay Seafood, Inc. v. Port of Seattle*, 124 Wn. App. 5, 15, 98 P3d. 491 (2004) (setting forth cause of action for negligent misrepresentation: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.").

[18] *See Swanson v. Solomon*, 50 Wn.2d 825, 828, 314 P.2d 655 (1957) (setting forth cause of action for fraud: "(1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.").

[19] For instance in the amended class action-style complaint filed in the *Stephens* case at paragraphs 60 through 64, Stephens asserts intimidation and coercion (para. 60) with intent to deceive (para. 61) in an attempt to take advantage of lay consumers (para. 62) in a manner that caused damage (para. 63). CP(S) 14-15.

any person who issues any form of demand letter to an alleged tortfeasor would also be subject to a potential CPA claim.

a. Efforts to Resolve Tort Disputes Without Litigation Should Not be Punished.

Insurance adjusters author thousands of subrogation claim letters to alleged tortfeasors in automobile accidents and other tort-based recovery claims annually. Public adjusters routinely send demand letters to alleged tortfeasors and their insurers. Assistant state attorney generals send out letters to collect child support or subrogate for workers compensation payments. All of these authors could be subject to treble damages and attorney fees under the CPA if the recipient subjectively believes the letters could have a capacity to deceive. To further important public policy goals of judicial economy and preservation of resources, this Court should decline to punish efforts to expeditiously resolve tort claims outside of costly litigation.

Plaintiffs' attorneys and legal staff often issue "demand letters" or "offers to settle." All such letters convey the same basic message – the recipient owes money to resolve a tort claim. Indeed those letters, which are frequently sent to alleged tortfeasors who are not represented by counsel, cast the facts of a case in the light most favorable to the tort claimant. The widespread practice of highlighting favorable facts and

omitting or downplaying less favorable facts could be construed as having the capacity to deceive. If this Court were to hold that CPA applies to the adversarial tort context, it would significantly erode the protections designed to shield attorneys in the course of the zealous advocacy of their clients. *See Short v. Demopolis*, 103 Wn.2d 52, 66, 691 P.2d 163 (1984) (holding that "claims which purely allege negligence or legal malpractice are exempt from the CPA"); *Jeckle,* 120 Wn. App. at 386; *Demopolis,* 59 Wn. App. at 119. To the extent that these cases continue to provide protection for attorneys, there is no logical rationale for subjecting non-attorneys to CPA claims for the exact same tasks attorneys are permitted to undertake.[20]

The simple truth is that for tort-based adversarial disputes any attempt to draw a line based upon who authors the claim letter, how many letters are authored, or how strongly worded the letters may be, simply will not work. There exists no demand letter nice enough to prevent its recipient from asserting a CPA cause of action on the basis that the letter nonetheless could have the capacity to deceive. In order to encourage and protect efforts to resolve disputes without litigation, this Court should hold that the CPA does not apply to adversarial tort disputes.

[20] Indeed, such a ruling may result in tort claimants (including but not limited to subrogating insurers) being mandated to incur additional costs associated with hiring attorneys to send virtually identical demand letters to alleged tortfeasors.

b. Subjecting Tort Claimants to the CPA Would Impose Conflicting Duties.

If this Court were to determine that a party has standing to bring a CPA claim after having received a subrogation demand letter, then the adjuster, claims services person, attorney or assistant attorney general must be concerned with a duty or fiduciary-style obligation to be pleasant in tone when communicating to the alleged tortfeasors. In *Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960), this Court aptly noted that "[t]he duty of an insurance company to protect its insured in the settlement of claims cannot consistently be extended to include protection to one who is prosecuting a claim against the insured." Likewise, it is impossible for tort claimants and their representatives to simultaneously protect the conflicting interests of claimants and alleged tortfeasors. This would lead not only to conflicting obligations, but also to enforcement problems. Moreover, the CPA would ultimately become an affirmative defense utilized in nearly all litigation. Every time litigation follows the receipt of a demand letter, it would appear to be in the best interests of the defendant to counter-claim against the plaintiff for violation of the CPA, in an effort to offset the defendant's own potential liability. This would have the peculiar effect of redirecting the focus of litigation away from the

underlying tort dispute to focus on the tone and content of the letters sent by the claimant.

The only workable solution is to limit application of the CPA to the subject matter of the type of activities it was intended to address – deceptive and unfair actions in consensual business-related transactions. In those transactions, there exists a form of consensual underlying relationship between the parties that justifies reasonable reliance on a particular form of conduct designed to protect the less sophisticated party. This is, of course, not present in an adversarial, tort-based incident like an automobile accident, in which the party alleged to be at fault knows to expect an aggressive claim over both fault and damages that may need to be vigorously contested. This has not been the province of the CPA and does not deserve to be now. In order to avoid placing conflicting duties upon tort claimants, this Court should hold that the CPA does not apply to adversarial tort disputes.

## D. The Court of Appeals Opinion Should Be Reversed and the CPA Claims Dismissed.

For the reasons discussed herein, this Court should hold that the CPA does not apply to disputes between adversaries such as tort claimants and alleged tortfeasors. As the subrogating insurers and their agent merely "step into the shoes" of the insureds, uninsured motorists who were

involved in accidents do not have standing to bring CPA claims against insurance companies and their collection agency in connection with the companies' efforts to collect on subrogation claims against the motorists.

As such, it is appropriate for this Court to reverse the Court of Appeals decision and dismiss the CPA causes of action asserted in *Panag* and *Stephens*. In *Panag*, this Court should affirm the trial court's order of dismissal,[21] and in *Stephens*, this Court should reverse the trial court's partial summary judgment order, and remand for further proceedings consistent with this Court's opinion.

Alternatively, should this Court determine that the CPA does apply to disputes between adversaries such as tort claimants and alleged tortfeasors, then remand is required to determine whether actual injury and causation exist to support a CPA violation on behalf of Ms. Panag and Mr. Stephens[22] as required by this Court's recent decision in *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) ("A plaintiff must establish that, but for the defendant's

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[21] CCS assigned error to a discovery order entered by the trial court in *Panag v. Farmers*, and presented substantive arguments to support reversal of that order. *See* Opening Br. of CCS (Panag), at 2-4, 13-29. The Court of Appeals reversed the trial court's summary judgment order, and thereafter declared that "the discovery issue is now moot." *Stephens*, 138 Wn. App. at 185. If this Court were to reverse the Court of Appeals, then remand would be necessary to address CCS's appeal of the discovery issues not previously addressed by that Court. *See* RAP 13.7(b).

[22] No court has yet determined whether any claimed damages are causally connected to the allegedly deceptive letters at issue or whether any payments of the subrogated demands by potential class members constitute actual damages.

unfair or deceptive practice, the plaintiff would not have suffered an injury.")[23]

## V. CONCLUSION

The claims for CPA relief of both Mr. Stephens and Ms. Panag in their purported class action lawsuits each arise from an underlying automobile accident claim in which they, the alleged tortfeasors, are adverse to the subrogating insurers and their agent, CCS.

For all of the reasons set forth herein and in other briefing submitted by CCS and Farmers, CCS respectfully requests that this Court reverse the Court of Appeals and articulate a bright-line holding that adversarial tort disputes such as these are not subject to the CPA as a threshold matter. Such a holding is consistent with established Washington law discussed above and sound public policies to encourage out-of-court settlements of tort disputes, avoid making the tone and content of demand letters the focus of every tort claim, and preserve duties of loyalty owing by persons who represent tort claimants.

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[23] CCS hereby expressly adopts by reference and incorporates herein those portions of the Supplemental Brief filed in this case by Petitioner Farmers Insurance Company that address the injury element of the CPA. *See* RAP 10.1(g).

RESPECTFULLY SUBMITTED this 1st day of May, 2008.

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FILED AS ATTACHMENT
TO E-MAIL

**DECLARATION OF SERVICE**

Dava Z. Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 1st day of May, 2008, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing Supplemental Brief of Petitioner Credit Control Services, Inc. I also served copies of said document on the following parties as indicated below:

| Parties Served | Manner of Service |
|---|---|
| ***Counsel for Panag & Stephens:***<br>Matthew J. Ide<br>Ide Law Offices<br>801 Second Avenue, Suite 1502<br>Seattle, WA 98104-1500 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |
| ***Counsel for Panag & Stephens:***<br>Murray T. S. Lewis<br>Lewis Law Firm<br>2400 E. Roy Street<br>Seattle, WA 98112 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |
| ***Counsel for Omni:***<br>Jerret E. Sale<br>Bullivant Houser Bailey PC<br>1601 Fifth Avenue, Suite 2300<br>Seattle, WA 98101-1618 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |

| Parties Served | Manner of Service |
|---|---|
| *Counsel for Farmers:*<br>Stevan David Phillips<br>Margarita Latsinova<br>Stoel Rives LLP<br>600 University Street, Suite 3600<br>Seattle, WA 98101 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |
| *Counsel for Amici ACA International:*<br>John Woodring<br>2120 State Avenue NE #201<br>Olympia, WA 98506-6514 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |
| *Counsel for Amici NASP:*<br>Thomas Wolfe<br>The Wolfe Firm<br>1200 Westlake Ave North, Suite 809<br>Seattle, WA 98109-3590 | ( ) Via Legal Messenger<br>( ) Via Overnight Courier<br>( ) Via Facsimile<br>(X) Via U.S. Mail |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 1st day of May, 2008.

Dava Z. Bowzer

Dava Z. Bowzer

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## OFFICE RECEPTIONIST, CLERK

**To:** Bowzer, Dava Z.
**Cc:** Granger, John; White, Melissa O'Loughlin; phil@tal-fitzlaw.com
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**Please find attached in PDF format the Supplemental Brief of Petitioner Credit Control Services, Inc., which we would request be filed among the papers of Cause No. 80357-9; Panag v. Farmers Ins. Co. and Credit Control Services, Inc. (consolidated with Cause No. 80366-8; Stephens v. Omni Ins. Co. and Credit Control Services Inc.). This document is submitted by Melissa O'Loughlin White, WSBA No. 27668, phone: (206) 340-1000, email: mwhite@cozen.com.**

**Thank you for your attention to this matter.**

<<2008-05-01 CCS Supplemental Brief for Supreme Court.pdf>>

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